

IN THE SUPREME COURT OF THE STATE OF OREGON

WEST LINN CORPORATE PARK, L.L.C.,

Plaintiff-Appellee,

v.

CITY OF WEST LINN, BORIS PIATSKI, and DOE
DEFENDANTS 1 THROUGH 10,

Defendants-Appellants,

United States Court of Appeals for the
Ninth Circuit
Case Nos. 0536061, 0536062

S056322

AMICUS CURIAE BRIEF

Order Accepting Certified Questions, entered on December 10, 2008 in the Supreme Court of the State of Oregon; signed by Chief Justice Paul J. De Muniz.

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SUMMARY OF ARGUMENT

The court should answer the second certified question affirmatively because the Takings Clause of the Fifth Amendment of the United States Constitution applies equally to *all* exactions. The underlying purpose and policy of the Takings Clause is to prevent the government from imposing public burdens on private individuals, and in the context of exactions, from using conditions of approval as leverage in furthering unrelated and disproportionate public interests. Any other holding would be inconsistent with the text, context, and policy of the exactions jurisprudence.

Under the standards set forth by the United States Supreme Court in *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*, an “essential nexus” must exist between an exaction and the asserted legitimate state interest, and the exaction must be “roughly proportionate” to the impact of the proposed development. While these cases involved exactions requiring the dedication of land, the court did not limit the scope of the standards set forth in *Nollan* and *Dolan* to dedications only. Rather, the language employed by the court in both *Nollan* and *Dolan* demonstrates the intent of the court to apply its holdings to all exactions.

In addition to the precedent set forth by the United States Supreme Court, a majority of states’ high court decisions apply *Nollan* and *Dolan* to both dedicatory and non-dedicatory exactions. Recognizing the practical equivalence of monetary exactions and real property exactions, the high courts in California, Texas, Washington, Illinois, and Ohio have all applied heightened scrutiny to monetary exactions. The New York Court of Appeals also followed suit in holding that exactions involving fees in lieu of dedication are subject to *Nollan* and *Dolan*. The few state courts holding to the contrary are distinguishable because the relevant cases involved legislatively imposed fees as opposed to adjudicative exactions, whereas the latter is at issue in this case. Furthermore, the courts declining to apply *Nollan* and *Dolan* to monetary exactions primarily rely on an erroneous interpretation of the United States Supreme Court’s decision in *City of*

Monterey v. Del Monte Dunes at Monterey. The court in *Del Monte Dunes* held that *Dolan's* heightened scrutiny does not apply to permit *denials*, an issue which is inapposite to the certified question in this case asking whether *Nollan* and *Dolan* apply to non-dedicatory conditions of permit *approvals*. Thus, the court limited its holding of *Del Monte Dunes* to the assertion that the *Dolan* standard does not apply to permit denials because permit denials do not involve exactions.

In addition to the standards set forth by the United States Supreme Court and a majority of the states' high court decisions applying *Nollan* and *Dolan* to non-dedicatory exactions, prior decisions by the Oregon Supreme Court have recognized that, from a land owner's perspective, there is no practical distinction between takings of real property as opposed to money. The two categories are functionally equivalent in terms of economic impact and potential for abuse, and each may be easily remedied with just compensation.

Therefore, the text, context, and policy reflected in the decisions of the United States Supreme Court, the majority of the states' high courts, and the Oregon Supreme Court support the interpretation that all exactions warrant heightened scrutiny pursuant to *Nollan* and *Dolan*, and the court should answer the second certified question affirmatively.

ANALYSIS

I. Takings Clause of the Fifth Amendment Jurisprudence.

The Takings Clause of the Fifth Amendment provides that private property shall not be taken for public use without just compensation. The purpose of the Takings Clause is to prohibit the "[g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U. S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960). The right to be free from uncompensated takings is a fundamental right equal to the right to free speech or the right to be free from unreasonable government searches and seizures. *Dolan v. City of Tigard*, 512 U.S. 374, 392 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994).

Both real property and personal property, including money, are protected by the Fifth Amendment's Takings Clause. *U.S. v. Sperry Corp.*, 493 U.S. 53, 60, 62 110 S.Ct. 387, 107 L.Ed.2d 290 (1989) (applying the Takings Clause to a governmental assessment requiring a 1.5 percent fee for processing claims associated with the Iran-United States Claims Tribunal and holding that the fee was a "fair approximation of the cost of the benefit supplied); See also *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980)(striking down a Florida statute appropriating a portion of funds deposited in a court registry because the money had obviously not be taken for services provided); *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 169-72, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998)(finding a Washington law violated the Takings Clause by appropriating interest earned in IOLTA accounts). The United States Supreme Court has been willing to apply the Takings Clause to all types of property because it recognizes, "[f]rom the property owner's point of view, it may matter little whether his land" is taken through conditions that demand disproportionate land dedication or excessive payment of impact fees. See *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 652 101 S.Ct. 1287, 67 L.Ed.2d 551 (Brennan, J., plurality dissent), adopted in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 107 S.Ct. 2378, 26 ERC 1001, 96 L.Ed.2d 250 (1987).

The court in *Lingle v. Chevron U.S.A., Inc.*, summarized the four types of takings. 544 U.S. 528, 125 S.Ct. 2074 (2005). First, the "paradigmatic taking . . . is a direct government appropriation or physical invasion of private property." *Id.* at 537. The second type of taking occurs when government regulation of private property become "so onerous that its effect is tantamount to a direct appropriation or ouster." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982); See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L. Ed. 2d 798 (1992). Third, regulation may "go too far" so as to become the functional equivalent of a traditional taking, thus triggering the payment

of compensation when the taking is less than total. See *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L. Ed. 2d 631 (1978). The fourth type of taking, as recognized by the United States Supreme Court, is the one at issue in this case: “a land-use exaction violating the standards set forth in *Nollan* and *Dolan*.” *Lingle*, 544 U.S. at 548. The definition of an “exaction” is at the heart of the United States Ninth Circuit Court of Appeal’s second certified question.¹

II. Exactions are Conditions of Approval that Require Property Owners to Exchange Personal or Real Property for Permission to Use Their Property.

Although the United States Supreme Court has not expressly defined the term “exaction,” its defining characteristics are settled. As it pertains to the Fifth Amendment, an exaction is any condition of a land use or building permit approval that requires a property owner to forfeit real property, personal property, money, or a combination of the three in order to receive permission to use his or her property in an otherwise lawful manner. S. Huffenus, *Dolan Meets Nollan: Towards a Workable Takings Test for Development Exactions Cases*, 4 N.Y.U. ENVTL. L.J. 30, 33 (1995). Exactions include, in-kind dedications and “in lieu fees” for infrastructure, impact fees, and special assessments. *Rogers Machinery, Inc. v. Washington County*, 181 Or. App. 369, 382, 45 P.3d 966 (2002) (internal quotes omitted). See also *Village of Norwood v. Baker*, 172 U.S. 269, 279 (1898) (referring to an assessment against property for improvements to abutting road as an exaction); *B.A.M. Development, L.L.C. v. Salt Lake County*, 128 P.3d 1161, 1169 (Utah 2006) (identifying the four types of exactions as: “(1) mandatory dedications of land for roads, schools, or parks, as a condition to plat approval, (2) fees-in-lieu of mandatory dedication, (3) water or sewage connection fees, and (4) impact fees”). However, courts differ as to whether all exactions should

¹ “Second, we ask whether a condition of development that requires a plaintiff to construct off-site public improvements, as opposed to dedicating an interest in real property such as granting an easement to a municipal entity, can constitute an exaction or physical taking.” *West Linn Corporate Park L.L.C. v. City of West Linn*, 534, F.3d 1091 (Or. 2008).

be subject to heightened scrutiny as proscribed in *Nollan* and *Dolan*. Therefore, the issue of constitutional significance is whether all exactions are protected by *Nollan* and *Dolan*.

III. The United States Supreme Court's Decisions Support Applying Heightened Scrutiny to Non-Dedicatory Exactions.

This case requires the court to interpret the Fifth Amendment as it applies to exactions. The United States Supreme Court has remanded lower court decisions because of unconstitutional exactions on three separate occasions. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987)(exaction of a public easement for beach access); *Dolan*, 512 U.S. 374, (1994)(exaction of a public easement for bicycles and stormwater management); *Ehrlich v. City of Culver City*, 512 U.S. 1231, 114 S.Ct. 2731, 129 L.Ed.2d 854 (1994) (vacating and remanding *Ehrlich v. City of Culver City*, 15 Cal.App.4th 1737, 19 Cal.Rptr.2d 468 (1993)(exaction of a \$280,000 fee in lieu of a public improvement). It is appropriate to review these decisions to guide this court's analysis.

a. *Nollan* requires an "essential nexus" and illustrates that monetary payments can be an unconstitutional exaction.

In *Nollan*, the California Coastal Commission required a "grant of access" to the public along the beach as a condition for the approval of a residential building permit in order to diminish the obstruction of the ocean view. *Nollan*, 483 U.S. at 827-28. The court later summarized the case as follows:

We agreed that the Coastal Commission's concern with protecting visual access to the ocean constituted a legitimate public interest. We also agreed that the permit condition would have been constitutional "even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby...whose sighting of the ocean their new house would interfere." We resolved, however, that the Coastal Commission's regulatory authority was set completely adrift from its constitutional moorings when it claimed that a nexus existed between visual access to the ocean and a permit condition requiring lateral public access along the Nollans' beachfront lot. How enhancing the public's ability to "traverse to and along the shorefront" served the same governmental purpose of "visual access to the ocean" from the roadway was beyond our ability to countenance. The absence of a nexus left the Coastal Commission in the position of simply trying to obtain an easement through gimmickry, which converted a valid regulation of land use into

“an out-and-out plan of extortion.” *Dolan*, 512 U.S. at 386-87 (internal citations omitted) (emphasis added).

In short, the court required that all exactions must have an essential nexus to the state’s justification in imposing the exactions. The court did not except exactions of money or personal property, and the text of the *Nollan* decision strongly suggests that the court intended essential nexus rule to apply to all exactions. Writing for the majority, Justice Scalia stated:

The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute \$100 to the state treasury. While a ban on shouting fire can be a core exercise of the State’s police power to protect the public safety, and can thus meet even our stringent standards for regulation of speech, adding the unrelated condition alters the purpose to one which, while it may be legitimate, is inadequate to sustain the ban. *Nollan*, 483 U.S. at 837.

While monetary exactions were not directly implicated in *Nollan*, this passage from the majority opinion evidences the Justices’ intent that the *Nollan* “essential nexus” standard should apply even when land dedications are not at issue.

Specifically, Justice Scalia’s passage illustrates two points. The first is that regardless of the fact that states may adopt certain regulations, if the government exacts property from citizens in such a way that the property has no nexus to the legitimate state interest authorizing the regulation, the *exaction* is unconstitutional no matter how great the state’s interest in the underlying regulation. And, the second point is crucial to resolve the certified question in the case at bench: an exaction of personal property, such as the payment of monetary fees, can provide the basis for a Takings Clause violation.

b. *Dolan* requires courts to apply heightened scrutiny to all exactions, ensuring they are roughly proportionate determinations.

In *Dolan*, the court held that exactions were subject to heightened judicial scrutiny and struck down two exactions imposed by the City of Tigard. As required by its development code,

the city conditioned the developer's building permit on the dedication of "all portions of the site that fall within the existing 100-year floodplain [of Fanno Creek] " and an adjacent strip of land. *Dolan*, 512 at 380. While the court quickly accepted the city's assertion that the two dedications had an "essential nexus," it reversed the Oregon Supreme Court's decision because it had applied an insufficient level of judicial scrutiny to the exactions. *Id.* at 387-88. The court stated the necessary standard of review as the following:

We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development. *Dolan*, 512 U.S. at 391 (emphasis added).

Therefore, *Nollan* and *Dolan* require a city to make individualized findings for all exactions evidencing that the exactions both (1) have an essential nexus to the justification for imposing the exactions and (2) are roughly proportionate to the projected impact of the proposed development. *Dolan*, 512 U.S. at 386-88. This heightened level of scrutiny must be employed by a court when considering the constitutionality of all exactions under the Takings Clause.

The evidence in the *Dolan* decision that the court intended heightened scrutiny to apply beyond the scope of dedicatory exactions is substantial. As in *Nollan*, the court did not expressly limit its holding to monetary or personal property exactions. Moreover, the text of the decision suggests heightened scrutiny applies to all exactions. In his dissent, Justice Stevens notes that the language of the court's holding, and precedent cited therein, applies equally to personal property exactions as well as real property dedications. He states:

All but one of the cases involve challenges to provisions in municipal ordinances requiring developers to dedicate either a percentage of the entire parcel (usually 7 or 10 percent of the platted subdivision) or an equivalent value in cash (usually a certain dollar amount per lot) to help finance the construction of roads, utilities, schools, parks, and playgrounds. In assessing the legality of the conditions, the courts gave no indication that the transfer of an interest in realty was any more objectionable than a cash payment. See, e.g., *Jenad, Inc. v. Scarsdale*, 18 N.Y.2d 78, 271 N.Y.S.2d 955, 218 N.E.2d 673 (1966); *Jordan v. Menomonee Falls*, 28

Wis.2d 608, 137 N.W.2d 442 (1965); *Collis v. Bloomington*, 310 Minn. 5, 246 N.W.2d 19 (1976). None of the decisions identified the surrender of the fee owner's "power to exclude" as having any special significance. Instead, the courts uniformly examined the character of the entire economic transaction. *Id.* at 400.

The dissenting Justices clearly believed *Dolan* applied to non-dedicatory exactions, and the majority Justices made no effort to disagree with this statement. Therefore, this passage is strong evidence that the majority Justices intended *Dolan* to be applied to all exactions.

Similarly, the court applied to the heightened level of scrutiny to more than mere easements or dedications. The court used the phrase "permit conditions" fourteen times. Watson, Matthew S., Note and Comment, *The Scope of the Supreme Court's Heightened Scrutiny Takings Doctrine and its Impact on Development Exactions*, 20 Whittier L. Rev. 181, 203-04 (1998). "Permit conditions" is a generally applicable term that includes required public improvements and cash payments. For example, the court stated: "The second part of our analysis requires us to determine whether the degree of the exactions demanded by the city's *permit conditions* bears the required relationship to the projected impact of petitioner's proposed development." *Dolan*, 512 at 388 (emphasis added). This language marks an express intent of the court to use the inclusive term "permit conditions" instead of a restrictive term, such as dedications, and suggests that the heightened scrutiny must apply to all permit conditions.

Moreover, the court's reasoning in both *Nollan* and *Dolan* was based in part on the doctrine of "unconstitutional conditions." It stated:

Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property. *Dolan*, 512 at 385 (citing *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968)).

Again, the use of a widely applicable doctrine that is not bound to real property dedications suggests that court's reasoning, and in turn the scope of its holding, went beyond mere dedications and included all types of exactions. Thus, the language and case citations used by the court in *Dolan* clearly demonstrate its intent for courts to apply heightened scrutiny to *all* exactions.

c. The *Ehrlich* remand supports the interpretation that *Nollan* and *Dolan* heightened scrutiny applies to all non-dedicatory exactions.

The third exaction decision issued by the United States Supreme Court helps to clarify the scope of *Nollan* and *Dolan*. In 1994, the United States Supreme Court granted certiorari, remanded, and vacated an accompanying case to *Dolan* for further consideration in light the court's heightened judicial review. *Ehrlich*, 512 U.S. 1231. In *Ehrlich*, a developer applied for a zone change from recreation zone to multi-family residential zone with the intent of replacing his private sports facility with condominiums. *Ehrlich v. City of Culver City*, 12 Cal.4th 854, 911 P.2d 429, 438-39, cert. denied 519 U.S. 929, 117 S.Ct. 299, 136 L.Ed.2d 218 (1996). The city approved the zone change, but imposed a condition requiring the developer to make a \$280,000 payment in lieu of construction of four public tennis courts. *Id.* at 434-35. The developer appealed, and the United States Supreme Court ultimately granted certiorari. *Ehrlich*, 512 U.S. 1231. The court vacated the California Appellate court's decision and remanded for further consideration in light of *Dolan*. *Id.* The actions taken by the United States Supreme Court in *Ehrlich*, therefore, illustrate its intent that the heightened scrutiny formulated in *Nollan* and *Dolan* applies to non-dedicatory exactions. In other words, if *Nollan* and *Dolan* only apply to dedicatory exactions as a matter of law, then the court would have had no basis for vacating the California Appellate court decision involving only monetary exactions.

d. Public policy concerns identified in *Nollan*, *Dolan*, and *Ehrlich* apply equally to non-dedicatory exactions.

The purpose of the Fifth Amendment is to ensure the property of the minority is not taken for the benefit of the majority without just compensation. *Armstrong*, 364 U.S. at 49. The court in

Nollan and *Dolan* expanded on this fundamental principal, recognizing that when individuals apply for building or land use permit applications for their property, they are particularly exposed to the government's taking of private property.

Pursuant to an appeal before the California Supreme Court subsequent to the *Ehrlich* remand, the court held that heightened scrutiny consistent with *Nollan* and *Dolan* applied to monetary takings. *Ehrlich*, 12 Cal.4th 854, 911 P.2d at 438. It explained accordingly:

[I]t matters little whether the local land use permit authority demands the actual conveyance of property or the payment of a monetary exaction. In a context in which the constraints imposed by legislative and political processes are absent or substantially reduced, the risk of too elastic or diluted a takings standard—the vice of distributive injustice in the allocation of civic costs—is heightened in either case. Support for this view of the scope of the test can be drawn from a close reading of the text of Justice Scalia's opinion in *Nollan* and from the Chief Justice's opinion in *Dolan*. *Ehrlich v. City of Culver City*, 12 Cal.4th 854, 876, 911 P.2d 429 (Cal. 1996) (emphasis in original).

Thus, the heightened level of scrutiny under the Fifth Amendment exactions analysis is needed to ensure the government does not take advantage of its position in the application review process, and it is the act of the government exaction – not the type of property interest being exaction – that triggers heightened scrutiny.

The problem, identified by the California Supreme Court in *Ehrlich*, of local governments taking advantage of their monopolistic permit authority, applies equally as well in Oregon. Former Oregon Supreme Court Justice Edwin Peterson highlighted this problem in his dissent in *Dolan*. He stated:

From reading the order in this case, I am convinced that Tigard decided that it needed a pedestrian/bicycle pathway and a flood control greenway easement along Fanno Creek. One way of getting these, free of cost, is by requiring all owners who propose to change the use of their property to convey the easements to the city. That is what happened in this case. *Dolan*, 317 Or. at 129-30.

Justice Peterson recognized that it was the role of the court to carefully scrutinize Oregon local governments' exactions of individual property for public improvement projects because they may take advantage of the permit approval process to unlawfully appropriate desired property. The

danger of an unconstitutional taking identified by Justice Peterson is equally present when a local government needs money or improvements for a public project instead of, or in addition to, real property dedications. Moreover, the injury to the individual is no less damaging when personal property is taken over real property.

Therefore, as demonstrated by *Dolan*, a Fifth Amendment exactions analysis should not be limited to the loss of property rights suffered by a property owner. Rather, a court should also examine the motivations behind the exaction. If the government is using gimmickry to obtain property as a condition of approval, than an otherwise valid land use regulation becomes “an out-and-out plan of extortion” regardless of whether the target of the gimmickry is real or personal property. *Dolan*, 512 U.S. at 387. This inquiry is at the heart of the court’s obligatory review under *Nollan* and *Dolan*. To ignore a government’s extortionate actions simply because the interest involved is not real property would undermine the purpose and policy of constraining the risks of abuse associated with land use regulation. The Fifth Amendment does not allow such arbitrary distinctions. *Nollan*, 483 U.S. at 841 (“We view the Fifth Amendment’s Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination.”).

In summary, the United States Supreme Court’s decisions in *Nollan*, *Dolan*, and *Ehrlich* all support an application of the heightened level of review first articulated in *Dolan* to non-dedicatory exactions as well as dedicatory exactions. Support for this conclusion is found in the language of each decision, and in the associated policy rationales that formed the basis of each decision. Moreover, there is simply no sound policy basis to conclude that an extortionate demand of \$100,000 for payment of a fee to offset alleged development impacts should be treated any differently, for Takings Clause purposes, than an exaction requiring dedication of an easement worth \$100,000. The character of the entire economic transaction, the injury to the citizen, and

the temptation of the government is the same in either circumstance. Permitting such an arbitrary distinction would fly in the face of the Fifth Amendment United States Supreme Court's precedent.

IV. The States' High Court Decisions Support Applying Heightened Scrutiny to Non-Dedicatory Exactions.

a. **The majority of state high court opinions apply *Nollan/Dolan* to non-dedicatory exactions.**

Like the California Supreme Court in *Ehrlich*, the majority of state high courts have applied the constitutional protections of *Nollan* and *Dolan* to non-dedicatory exactions as well as dedicatory exactions. The Texas, Illinois, and Ohio Supreme Courts have applied heightened scrutiny to monetary exactions even when the sources of the exactions are generally applicable fees imposed by statute or ordinance. *Town of Flower Mound v. Stafford Estates LP*, 135 S.W.3d 620, 639-40 (Tex. 2004) (applying *Nollan* and *Dolan* to offsite street improvements and stating “[f]or purposes of determining whether an exaction as a condition of government approval of development is a compensable taking, we see no important distinction between a dedication of property to the public and a requirement that property already owned by the public be improved”); *Northern Ill. Home Builders Ass’n v. County of Du Page*, 165 Ill.2d 25, 649 N.E.2d 384 (1995) (citing *Nollan* and *Dolan* and applying a heightened level of scrutiny to an ordinance requiring transportation impact fees on new developments); *Home Builders Ass’n v. City of Beavercreek*, 89 Ohio St.3d 121, 729 N.E.2d 349 (2000) (applying a “dual rational nexus test” and citing *Nollan* and *Dolan* to determine the constitutionality of a transportation impact fee).

Washington law also applies heightened scrutiny for monetary exactions. The Revised Code of Washington (RCW), sections 36.70C.130(1)(c) and 82.02.020 together prohibit non-dedicatory exactions unless they are reasonably necessary and place the burden of proving such necessity on the local government. *Benchmark Land Co. v. City of Battle Ground* 146 Wash.2d 685, 696-99, 49 P.3d 860 (2002)(Sanders J., concurring). Moreover, when the Washington Supreme Court reached the constitutionality of non-dedicatory exactions, it applied

heightened scrutiny to monetary exactions for off-site improvements pursuant to *Dolan*. *Trimen Dev. Co. v. King County*, 124 Wash.2d 261, 877 P.2d 187, 189-90 (1994) (county's park development fees were lawful under *Dolan* because fees were imposed pursuant to a voluntary agreement and were reasonably necessary as a direct result of the proposed development); *but see City of Olympia v. Drebeck*, 156 Wash.2d 289, 302 n. 4, 126 P.3d 802 (2006) (refusing to extend *Dolan* to generally applicable regulatory fees but acknowledging constitutional protections exist for monetary exactions).

The New York Court of Appeals has applied *Nollan* and *Dolan* to fees in lieu of dedications, and cited *Nollan* and *Dolan* in a decision holding that rent control statutes were unconstitutional. *Twin Lakes Dev. Corp. v. Town of Monroe*, 1 N.Y.3d 98, 105, 801 N.E.2d 821 (2003), *cert. denied*, 541 U.S. 974 (2004); *Smith v. Town of Mendon*, 4 N.Y.3d 1, 12, 822 N.E.2d 1214 (2004) (*Dolan* scrutiny applies to dedications of land and to fees-in-lieu of land dedications); *but see Manocherian v. Lenox Hill Hosp.*, 618 N.Y.S.2d 857, 862, 643 N.E.2d 479, 84 N.Y.2d 385 (1994) (relying on *Nollan/Dolan* in part and holding a rent control law did not have a sufficient nexus to a legitimate state interest and was not roughly proportionate).

In addition to providing a majority rule, the willingness of the California, Washington, Texas, Illinois, Ohio, and New York Supreme Courts to apply *Nollan* and/or *Dolan* and heightened scrutiny to non-dedicatory exactions demonstrates that such scrutiny does not erode the state and local government's police powers. Rather, it supports the interpretation by the Texas Supreme Court that there is no "reason why limiting a government exaction from a developer to something roughly proportional to the impact of the development-- in other words, prohibiting "an out-and-out plan of extortion" --will bring down the government," and "the burden [of judicial review] is essential to protect against the government's unfairly leveraging its police power over land-use regulation to extract from landowners concessions and benefits to which it is not entitled." *Town of Flower Mound*, 135 S.W.3d at 639.

Moreover, the burden of making individualized findings justifying the exactions is less onerous and more justified in Oregon because it is consistent with the existing overall land use system. But for a few exceptions, all appeals of “land use decisions” and “limited land use decisions,” as those terms are defined by ORS 197.015(10) and (12), are originally reviewed by the Oregon Land Use Board of Appeals (LUBA). ORS 197.825(1). LUBA is obligated to reverse or remand all decisions that do not have adequate findings to support the decision. Oregon Administrative Rule 661-010-0071(2). Thus, local governments are already obligated to make written findings justifying their decision. Therefore, the interpretation that *Nollan/Dolan* heightened scrutiny applies to all exactions is consistent with the majority state rule, and the burden of judicial review—to the extent an increased burden even would exist—is justified.

b. The majority of state high court decisions that refused to apply *Nollan/Dolan* to non-dedicatory exactions are distinguishable from this case and are of limited precedential value.

While several state opinions have been cited for the proposition that the *Nollan/Dolan* heightened scrutiny does not apply to monetary exactions, only the Colorado and Georgia Supreme Courts have held directly on the matter. However, their holdings are limited and distinguishable from this case. In *Krupp v. Breckenridge*, the Colorado Supreme Court refused to apply *Nollan/Dolan* to a “service fee”—a legislatively determined assessment for the defrayed costs of a sewer system—because the fee was legislatively imposed on all property owners within the service district seeking a building permit. 19 P.3d 687, 697-98 (Colo. 2001). However, the court was careful to acknowledge that its holding did not extend to discretionary or adjudicative monetary exactions, such as the one at issue in this case.² Similar to *Krupp*, the court in *Parking*

² The court stated: “We recognize that the context of the Supreme Court's pronouncement in *City of Monterey* leaves open the possibility that a very narrow class of purely monetary exactions may be subject to heightened scrutiny under the *Nollan/ Dolan* test. The PIF, however, does not fall into this narrow class. In both *Ehrlich* and *Clark*, the charges subjected to the *Nollan/Dolan* analysis were not generally applicable fees, but rather exactions stemming from adjudications particular to the landowner and parcel. The court in

Ass'n of Georgia, Inc. v. City of Atlanta refused to grant declaratory relief because it held *Nollan* and *Dolan* did not apply to generally applicable development standards that were legislative in nature. 264 Ga. 764, 766, 450 S.E.2d 200 (1994).³ Neither of the above cited cases involved an adjudicatory monetary exaction as in this case. Therefore, they are distinguishable.

All other court decisions are easily distinguishable because the issue of whether *Nollan* and *Dolan* apply to non-dedicatory exactions was not before the courts, and/or the courts refused to apply *Nollan* and *Dolan* on other grounds. For example, while the South Carolina Supreme Court, in a footnote, cited *Del Monte Dunes*⁴ for the proposition that *Nollan* and *Dolan* only apply to dedicatory exactions, the court's holding did not reach this issue. *Sea Cabins Ass'n v. City of North Myrtle Beach*, 345 S.C. 418, 433, 548 S.E.2d 595 (2001) (holding the permit application was denied because of an inability to meet the criteria and not because of a refusal to submit to an exaction). Similarly, in *Home Builders Ass'n of Cent. Arizona v. City of Scottsdale*, the Arizona Supreme Court refused to apply *Nollan/Dolan* to a water impact fee for four reasons: 1) the issue of proportionality was not raised below; 2) the "roughly proportionate" standard was already codified and determined to have been satisfied in this case; 3) the exaction was legislatively created; and 4) the nature of the exaction was monetary instead of involving real property. 187

City of Beavercreek discussed *Nollan* and *Dolan* in the context of service fees, but ultimately articulated a "reasonable relationship" test." *Krupp*, 19 P.3d at 698.

³ While the issue of whether *Nollan/Dolan* heightened scrutiny applies to legislatively mandated impact fees is beyond the scope of this case, it is worth noting public policy favors applying heightened scrutiny to impact fees as well. Justice Thomas stated in his dissent in from the United States Supreme Court's denial of certiorari: "It is hardly surprising that some courts have applied *Dolan's* rough proportionality test even when considering a legislative enactment. It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. If Atlanta had seized several hundred homes in order to build a freeway, there would be no doubt that Atlanta had taken property. The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference." *Parking Ass'n of Georgia, Inc. v. City of Atlanta, Ga.* 515 U.S. 1116, 1117-18, 115 S.Ct. 2268, 132 L.Ed.2d 273 (1995)

⁴ *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999).

Ariz. 479, 485-86, 930 P.2d 993 (1997). Thus, the *Scottsdale* decision does not establish clear precedent that monetary exactions are not subject to heightened scrutiny because the court refused to apply *Dolan* for a variety of other reasons. The Kansas Supreme Court's decision in *McCarthy v. City of Leawood* is inapposite for the same reasons. 257 Kan. 566, 894 P.2d 836 (1995) (petitioners failed to raise *Nollan/Dolan* takings arguments below and failed to cite any authority to explain why *Nollan/Dolan* applied to monetary exactions).

The majority of state high court decisions that have determined whether heightened scrutiny applies to non-dedicatory exactions have held in the affirmative, and the majority rule is universal in cases where the scope of the exaction involves a discretionary quasi-judicial determination. Thus, if the court holds that *Nollan* and *Dolan* do not apply in this case, then it will give Oregonians the least amount of protection from extortive exactions in the country. Therefore, the court should follow the majority rule and the primary purpose of the Fifth Amendment and apply the heightened scrutiny required by *Nollan* and *Dolan* to non-dedicatory exactions.

V. The United States Supreme Court's Decision in *City of Monterey v. Del Monte Dunes at Monterey* is Inapposite As Well.

The courts that have not applied *Nollan* and *Dolan* to monetary or real property exactions primarily cite a passage in opinion in *City of Monterey v. Del Monte Dunes at Monterey*,⁵ 526 U.S. 687, 119 S.Ct. 1624 (1999) (hereinafter *Del Monte Dunes*). The passage states: "we have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use." *Id.* at 702-03. However, this case involves exactions pursuant to a permit approval and not a denial. Therefore, *Del Monte Dunes* does not apply in this case.

⁵ See, e.g., *City of Olympia v. Drebeck*, 156 Wash.2d 289 126 P.3d 802 (2006); *Sea Cabins Ass'n v. City of North Myrtle Beach*, 345 S.C. 418, 433, 548 S.E.2d 595 (2001).

A thorough examination of *Del Monte Dunes* demonstrates that the above quoted passage has been taken out of context and that the Justices simply recognized that *Nollan* and *Dolan* arose in the factual context of land dedications. By no means did *Del Monte Dunes* hold that *Nollan* and *Dolan* have no applicability to test the constitutionality of land-use conditions involving fee payments or other non-dedicatory exactions. The court merely held that *Dolan's* heightened scrutiny does not apply to permit *denials* and that denials involve no conditions of approval, i.e. exactions by definition. *Del Monte Dunes*, 526 U.S. at 703-07. Thus, nothing in *Del Monte Dunes* addressed the certified question in this case: whether *Dolan's* "rough proportionality" standard applies in the context of non-dedicatory exactions as excessive conditions on permit *approvals*. *Del Monte Dunes* simply decided that a *Dolan* analysis is misplaced where the challenged government action is a permit *denial*. The interpretation that *Del Monte Dunes* is inapplicable to exaction decisions is shared by the Texas Supreme Court in *Town of Flower Mound*, 135 S.W. 3d at 640 (Tex. 2004). The court stated:

The passage [from *Del Monte Dunes*] does no more than elaborate on the same distinction drawn in *Dolan* between conditions limiting the use of property and those requiring a dedication of property. In neither *Dolan* nor *Del Monte Dunes* did the Supreme Court have reason to differentiate between dedicatory and non-dedicatory exactions. Nor does either case suggest that conditioning development of property on improvements to abutting roadways is somehow more like a restriction on the use of the property rather than a dedication of property. 135 S.W.3d at 636.

Therefore, *Del Monte Dunes* is inapposite because permit denials do not involve exactions.

VI. The Oregon Supreme Court Precedent have Applied Takings Analysis to Personal Property and the *Nollan/Dolan* Heightened Level of Judicial Scrutiny Should Apply in this Case.

Prior decisions by Oregon Supreme Court have recognized that from a land owner's perspective, there is no practical distinction between takings of real property as opposed to money. In *Hawkins v. City of La Grande*, the court held that personal property can be subject to Oregon's Takings Clause independently from any taking of real property. 315 Or. 57, 67, 843 P.2d 400 (1992) ("[p]ersonal property, such as the livestock and crops at issue here, can be taken;

there is no requirement that the realty on which the personal property is located must be taken, too”). In *Bowden v. Davis* the court again applied a takings analysis with regards to the government destruction of a horse. 205 Or. 421, 434, 289 P.2d 1100 (1955). And, in *Coos Bay Oyster Co-op. v. State*, the court recognized that taking oysters was an actionable inverse condemnation claim under Oregon law. 219 Or. 588, 596, 348 P.2d 39 (1959).

Similarly, the court has held that a monetary judgment or decree is “personal property, giving rise to vested rights which the legislature cannot, by retroactive law, either destroy or diminish in value” without constituting a taking. *State ex rel. v. Kiessenbeck*, 167 Or. 25, 30, 114 P.2d 147 (1941). Accordingly, the court prohibited the legislature from subsequently altering alimony decree awarding money to a particular party because it was a final adjudication of the rights of the parties. *Id.* The court’s application of the Takings Clause in *Kiessenbeck* is further evidence that Oregon has a rich jurisprudence of applying the Takings Clause beyond the scope of real property.

Thus, the Oregon Takings Clause jurisprudence recognizes that personal property and money can be subject to a takings claim. Moreover, this precedent is consistent with the fact the economic impact of monetary takings is equal to real property takings. Each has an identifiable economic impact on the builder or property owner. Each is susceptible to the same kind of abuse by the government. Each can be easily remedied by application of the just compensation requirement. (In fact, it may be easier to require just compensation for monetary exactions than for exactions of real estate. When the latter cannot meet the rough proportionality standard, a court must determine the value of the excess land that was taken by the permitting authority. This step is unnecessary when the taking is accomplished by an excessive fee – all the court needs to do is order a payment back of the over-charge.) Therefore, this court should apply the *Nollan/Dolan* standard of review to all exactions.

CONCLUSION

The above analysis demonstrates that the court should apply heightened scrutiny to all permit exactions. The purpose and policy of the Takings Clause will not be served if this court allows the state and local governments to exact money when the conditions of approval do not have an essential nexus to the mandatory findings and the quantum of money or property taken is not roughly proportionate to the impact. Therefore, the *Amicus* respectfully requests that the court affirmatively answer the second certified question and hold that *Nollan/Dolan* scrutiny applies to all real property and monetary exactions.

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